

# An Emergency within an Emergency within an Emergency

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On September 17, 2020, I published a [blogpost](#) on Verfassungsblog, warning that while COVID-19 has not, at the time, been used in Israel as a justification for banning protests, there was reason for concern. The [Coronavirus Law](#), enacted in July, exempted demonstrations from the general prohibition on gatherings. However, as members of the *Likud* party, including PM Netanyahu himself, continued to accuse protestors of spreading the virus, the possibility that demonstrations would be curtailed was very much real.

The concern materialized on September 30, 2020. The *Knesset* [amended the Coronavirus Law](#) to allow the government to declare a “special coronavirus emergency situation” (the “Amendment”). This “special” emergency situation is to be declared on top of the “regular” “coronavirus emergency situation”, which was previously declared under the Coronavirus Law.

The Amendment created a matryoshka doll of emergency situations. At the beginning of the pandemic, the government relied on the [general national security emergency](#) situation, which exists in Israel since its inception in 1948, to enact emergency regulations. While perhaps justified at the time, the reliance on the general emergency situation, and the issuance of emergency regulations pursuant to it, were perceived as problematic. First, the threats posed by COVID-19 were public health and not national security related. Second, and more importantly, the Supreme Court has, narrowed throughout the years the scope of situations in which emergency regulations could be enacted pursuant to the ongoing emergency situation.

The *Knesset* then enacted the Coronavirus Law, which authorized the government to declare a “coronavirus emergency situation”. The coronavirus emergency situation exists *in addition* to the general, ongoing national security emergency situation, which continues to apply. The latest amendment, which allows the government to declare a “special coronavirus emergency situation”, thus creates an additional, *third* layer of emergency situations in Israeli law.

The three layers of emergency situations differ in the periods for which they can be declared or extended, as well as in the type and severity of restrictions that they enable the government to impose. The general emergency situation is declared by the *Knesset* and renewed annually. The “regular” coronavirus emergency situation is declared by the government, for up to 45 days, and can be extended, subject to certain conditions, by periods of 60 days. The “special” coronavirus emergency situation is declared by the government, for seven days, and can be extended by the government for additional seven-day periods, up to 21 days, and, subject to approval of the *Knesset* committee, for periods of up to 14 days. The “special”

coronavirus emergency situation allows for the imposition of additional restrictions, stricter than those allowed under the “regular” coronavirus situation. In particular, it allows limiting the participation in protests to a certain distance from home, and allows the government to impose restrictions on the number of people taking part in a “demonstration, prayer or religious ceremony”, as long as such restriction is necessary for the protection of public health, and as long as the restriction will not “completely prevent” the existence of a protest, prayer, or public ceremony.

Immediately after the amendment of the Coronavirus Law, the government issued regulations limiting demonstrations to up to 1000 meters (1KM) from home, and determining that the number of participants is limited to 20 people, who must wear masks and keep 2m apart from each other (the “Regulations”). The Regulations prevented protesters from taking part in the Balfour protests, which have been taking place outside of Netanyahu’s official residence. Several petitions against the Coronavirus law, the Amendment and the Regulations have been filed to the Supreme Court.

The amendment of the Coronavirus Law raises an array of questions, three of which are particularly important. The first regards the implications of normative framework characterized by layers of emergency situations. The second regards the government’s decision to bind together two types of gatherings, demonstrations and prayers. The third regards the question of when the protests can be argued to be “completely prevented” under the latest Regulations.

## **Three Layers of Emergency Situations**

The COVID-19 crisis prompted states to implement a variety of emergency measures, and reinstated jurists’ interest in the law of emergency. Jurisprudence of the law of emergency recognizing, on the one hand, the need to take extraordinary measures, often quickly, while, on the other hand, the need to ensure that human rights, as well as basic principles such as democracy, are protected as much as possible. In achieving this balance, the temporary nature of emergency situations, the need to tailor restrictions narrowly, the requirement of proportionality and the importance of parliamentary or judicial supervision are perceived as key safeguards. The underlying assumption is that an emergency situation is an exceptional one.

The creation of layers of emergency situations undermines this assumption and erodes the special scrutiny to which emergency situations are subject. Each layer of “emergency” added normalizes the earlier ones, characterizing the restrictions taken under them as less severe. The urgency and severity of a situation, which keep both the public and the supervising institutions “on guard”, are weakened if characterized as less severe than the situation that directly preceded it. In the case of Israel, should the government decide not to extend the “special” emergency situation, as is likely to happen, the feeling of “normality” will be restored. This, however, is largely false, as the “regular” coronavirus emergency situation, and the extensive governmental powers that come with it, are still in force. Needless to say, so is the general, national security emergency situation.

## Demonstrations and Prayers – Two for the Price of One?

A second important issue is the binding together, in the Amendment, of protests and prayers. The explanation for this is purely political. Public discourse in Israel has revolved, in recent weeks, around who is “to blame” for the rise in coronavirus cases. While some members of the *Likud* referred to the demonstrations as “coronavirus hubs”, others pointed to the rising number of Coronavirus cases and the documented defiance of prohibitions on gatherings in Ultra-Orthodox communities, in particular, during the Jewish holiday period. With Ultra-Orthodox political parties being important coalition members, the government was under political pressure to prove that it does not “target” the Ultra-Orthodox community. Politically, if one sector is required to make sacrifices, the opposing sector, in this case, Netanyahu’s opponents, are required to make sacrifices as well. The binding together of demonstrations and prayers is thus based on a peculiar *quid pro quo*-principle. This is, of course, completely incompatible with how restrictions on human rights in situations of emergency ought to be imposed. Freedom of assembly and freedom of religion are both important rights, but the justification for restricting each of them should be assessed individually. That is, with respect to each of the two rights, the necessity of restrictions, the existence of a less restrictive measure to achieve the restrictions goals, and the question of proportionality should be examined.

## When is the Right to Demonstrate “Completely” Eroded?

Finally, remains the question of whether the Amendment “completely prevents” the existence of protests. Here, the answer appears initially to be blatantly negative. The Regulations created a [backlash](#) affect. While prohibited from continuing the protests in Balfour, the protest organizers turned their energy to strengthening the dispersed, local “black flag” demonstrations that have been taking place in recent months on main bridges and junctures in Israel. The Regulations fueled these protests, and the number of protesters multiplied, with over 100,000 protesters reportedly participating.

Despite this, the Regulations actually do severely hinder the right to demonstrate, and arguably, at least for some, completely prevent it. The right to demonstrate can be described as including two components: the first is the “expressive” component, which ensures one’s right to manifest their opinion and be heard. This component can allegedly be exercised even under the Regulations and can be expressed by a single protester. However, the ban on demonstrating further than 1KM from home affects this component unequally. Those living in cities, next to central junctures and near the residents of public officials, can arguably still be heard and thus can protest “effectively”. Those living the periphery, however, will largely protest in the void.

The second component of the right to demonstrate is the freedom of assembly. Recognized as an independent [right](#) under the International Covenant of Civil and Political Rights, this component emphasizes the collective aspects of demonstrating,

including the importance of deliberation, mutual support among demonstrators, and communal actions. Limiting gathering to 20 individuals acutely affects this component. Freedom of Assembly is not absolute, but limitations must be crafted narrowly and be necessary for the protection of the public interest at stake – in this case public health. This requires, among other things, that they are made on sound factual grounds, examining the relationship between each restriction and the protection of public health. In the case of the Regulations, this requirement was not met.

## **And Then There Were Two**

The restrictions on the Balfour protests backfired, and the state has announced, in advance of the Supreme Court's first hearing of the petitions against the Regulations, that it will not seek their extension. The current round thus ended with the right to protest prevailing. However, both the Coronavirus Law and the Amendment currently still stand. As the protests expand, and with the possibility of elections in the horizon, further attempts to restrict freedom of expression in Israel are not unlikely. Public response was enough to lead to the latest restrictions being abolished. However, looking forward, the Court may have no choice but to intervene.

